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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS ANTHONY McCOOL,

Defendant and Appellant.

E062944

(Super.Ct.No. FMB1400380)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed in part and reversed in part.

Nancy S. Brandt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Scott Taylor, Alana Butler, and Laura Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

On June 25, 2015, four months after having found defendant and appellant, Thomas Anthony McCool, in violation of his probation and sentencing him to three years' incarceration, and four months after defendant had appealed that decision, the trial court issued a criminal protective order (CPO) pursuant to Penal Code section 273.5.<sup>1</sup> On appeal, defendant contends the trial court lacked jurisdiction to issue the CPO and requests that this court strike the order. The People concede the court lacked jurisdiction to issue the CPO, but request the matter be remanded to the trial court to determine whether a CPO should be issued. We reverse the trial court's issuance of the CPO.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2014, an officer responded to a motel and made contact with the victim, who told the officer that defendant, her husband, and she had engaged in an argument which led to a physical altercation.<sup>2</sup> The victim stated defendant had taken her purse away, pushed her to the ground, and emptied the contents of the purse upon her causing a laceration to her lip. She left the premises, whereupon defendant threw her down on the driveway causing additional injuries. After holding defendant to answer, the court issued a CPO prohibiting defendant from having contact with the victim.

On August 13, 2014, the People charged defendant by felony complaint with corporal injury to a spouse. (§ 273.5, subd. (a).) The People further alleged defendant

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The parties stipulated the preliminary hearing would provide the factual basis for defendant's guilty plea. We take our facts from that hearing.

had two prior convictions for battery upon a spouse (§ 243, subd. (e)(1)) committed within the last seven years (§ 273.5, subd. (f)(2)).

On August 29, 2014, pursuant to a plea agreement, defendant pled guilty to the offense. In return, the remaining allegations were dismissed and the court sentenced defendant to three years' felony probation. Term 20 of defendant's probation required that he have no contact with the victim. Term 21 required that he comply with all protective orders obtained by the victim. Term 22 required that defendant complete a 52-week domestic violence batterers' program.

At sentencing, the prosecutor inquired: "Just to verify, your Honor. I believe you did issue a CPO at the last court hearing in this case." The court responded: "If that was issued, then that will remain."

On January 14, 2015, the People filed a petition for revocation of defendant's probation alleging he had failed to comply with the terms of his probation in that he had had contact with the victim and been kicked out of his domestic violence class. On February 13, 2015, the court held the contested probation revocation hearing.

A probation officer testified she spoke to the victim, who informed the probation officer that defendant had gone to the victim's work, was causing problems at her home, and violated a restraining order or CPO prohibiting him from contact with her.<sup>3</sup> On June 9, 2015, the probation officer conducted a home visit for probation compliance; she

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<sup>3</sup> Testimony was adduced that probation officers use the terms "restraining order" and "criminal protection order" interchangeably. A probation officer also testified probationers also confuse those terms with stay away probation conditions.

found defendant at the victim's residence. Defendant stated he had moved in with the victim and that the restraining order had been lifted.<sup>4</sup>

The probation officer stated she knew the restraining order had not been lifted and that term 20 of defendant's probation required him to stay away from the victim regardless. The probation officer arrested defendant. The probation officer had also received notification that defendant had been dropped from his domestic violence course for missing four sessions.

The court acknowledged that it had issued a CPO on August 7, 2014. It found defendant in violation of the CPO and term 20 of his probation. The court further found defendant in violation of the term of his probation requiring that he successfully complete a domestic violence batterers' program. The court found defendant not suitable for a further grant of probation due to his criminal history. It sentenced defendant to the midterm of three years' incarceration.

On February 17, 2015, defendant filed a notice of appeal. At a hearing on June 25, 2015, defense counsel noted: "It seems that at the final sentencing of [defendant], the criminal protective order that's in the . . . system was not recalled and there was no longer a lasting order that was made on that date. [¶] So my motion would be for the criminal protective order on this case . . . [to] be recalled." The People requested the issuance of a new CPO: "I should have submitted one that was more permanent under [section] 273—

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<sup>4</sup> The court read and considered a transcript of oral proceedings occurring on November 5, 2014, in a family law case wherein the restraining order that had been in place from the family law court was terminated.

instead of the [section] 136.2 . . . that’s what I’d like to do.” Defense counsel responded: “That should have been done at the time of sentencing. It would have been a decision your Honor made at the time of sentencing.” The court replied: “Well, I’m going to sign that and it will be delivered to the state prison for them to serve him with that.” The court terminated the previous CPO and issued another CPO upon the People’s motion. Defendant filed subsequent appeals on July 13 and 22, and August 24, 2015.

## II. DISCUSSION

Defendant contends the court lacked jurisdiction to issue the new CPO because it did so after sentencing and after defendant had filed an appeal. The People concede that the court lacked jurisdiction to issue the CPO, but assert the matter should be remanded to allow the court to determine whether to issue another CPO. We agree with defendant.

“Generally, the filing of a notice of appeal vests jurisdiction in the appellate court and divests the trial court of jurisdiction to make any order affecting the judgment. [Citations.] “Because an appeal divests the trial court of subject matter jurisdiction, the court lacks jurisdiction to vacate the judgment or make any order affecting it. [Citations.] Thus, action by the trial court while an appeal is pending is null and void. [Citations.] Indeed, ‘[s]o complete is this loss of jurisdiction effected by the appeal that even the consent of the parties has been held ineffective to reinvest the trial court with jurisdiction over the subject matter of the appeal and that an order based upon such consent would be a nullity.’ [Citation.]” [Citations.]” (*People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1496.)

“Upon conviction under [section 273.5,] subdivision (a), the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison or county jail, or if imposition of sentence is suspended and the defendant is placed on probation.” (§ 273.5, subd. (j).)

The “CPO” signed by the court on August 7, 2014, does not indicate under which Penal Code section it was issued. Nevertheless, a rationale inference may be made that the court issued the order pursuant to section 136.2. “Although section 136.2 does not indicate on its face that the restraining orders it authorizes are limited to the pendency of the criminal action in which they are issued or to probation conditions, it is properly so construed. It authorizes injunctions only by courts with jurisdiction over criminal proceedings and is aimed at protecting only ‘victim[s] or witness[es],’ an indication of its limited nature and focus on preserving the integrity of the administration of criminal court proceedings and protecting those participating in them.” (*People v. Stone* (2004) 123 Cal.App.4th 153, 159.)

Here, the court issued the CPO on August 7, 2014, the date defendant was held to answer. Thus, it was not issued after defendant’s conviction at sentencing like a CPO issued pursuant to section 273.5. Furthermore, both the defense and the People

acknowledged it was not a permanent order. The People noted: “I should have submitted one that was more permanent under [section] 273—instead of the [section] 136.2 . . . .”

Thus, the CPO issued on August 7, 2014, was limited to the pendency of the criminal proceedings below which ended on February 13, 2015, when the court found defendant in violation of his probation and sentenced him to prison.

The court did not issue a CPO when it sentenced defendant. Defendant subsequently filed an appeal, which divested the court of jurisdiction to issue a CPO pursuant to section 273.5. As the People concede, “the criminal protective order issued under section 273.5, subdivision (j), constitutes an unauthorized sentence because the court lacked jurisdiction to order it after sentencing . . . .” Thus, the CPO issued on June 25, 2015, must be reversed.

The People contend the matter must be remanded for determination of whether a CPO should issue because section 273.5 requires the court consider issuance of a CPO at sentencing. However, courts have found that the People may forfeit imposition of statutorily mandated dispositional orders where they failed to request the order or object to the court’s failure to issue it. (*People v. Tillman* (2000) 22 Cal.4th 300, 301-303 [forfeiture doctrine barred the People from seeking restitution fees on appeal where the trial courts failed to abide by statutory provisions requiring them to impose restitution fines as part of the judgment of conviction].)

Here, the People did not request issuance of a CPO or object to the court’s failure to consider issuance of a CPO at the time defendant was sentenced. Rather, the People

only requested issuance of a CPO four months after sentencing, four months after defendant filed an appeal, and after the defense requested recall of the restraining order issued pursuant to section 136.2. Indeed, the People indicated they “should have submitted” a request for a CPO at the time of sentencing. Thus, the People forfeited any contention on appeal that the court should have issued a CPO when it sentenced defendant.

### III. DISPOSITION

The criminal protective order issued on June 25, 2015, is reversed. In all other respects, the judgment is affirmed.

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McKINSTER  
Acting P. J.

We concur:

MILLER  
J.

CODRINGTON  
J.